SASKATCHEWAN

FAIRNESS:
A BRIEF EXPLANATION

YOU CAN NOT HAVE JUSTICE
WITHOUT FAIRNESS
-POTTER STEWART

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Fairness:
A Brief Explanation

Office of the Provincial Ombudsman
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Fairness

Each year, virtually every adult in Saskatchewan deals in some way with the provincial government. Paying taxes, obtaining a driver's licence or simply switching on a light - these are just a few of the many instances when members of the public deal with provincial government agencies.

Given the frequent interaction between government and the public, it is inevitable that there will be occasions when people are not satisfied with the services they receive or the way they are provided. It is also inevitable that there will be occasions when that dissatisfaction cannot be resolved. In those cases, the Ombudsman may be able to help.

What Is An Ombudsman?

The Ombudsman is an independent officer of the Legislative Assembly who objectively investigates complaints about administrative actions and decisions of the provincial government and its departments, boards, commissions and crown corporations. If, after investigation, it is concluded that the government agency acted unfairly, the Ombudsman may make recommendations to rectify the complaint.

This raises several questions: How does the Ombudsman determine what is and is not fair? What is the test? The answers are found in *The Ombudsman and Children's Advocate Act*.

Section 24 of *The Ombudsman and Children's Advocate Act* directs the Ombudsman to consider a number of criteria when determining whether government acted fairly. The *Act* reqires the Ombudsman to determine whether the decision, action or ommission is:

- **unreasonable**
- **contrary to law**
- **unjust**
- **oppressive**
- **improperly discriminatory**
- **based on a mistake of law or fact; or**
- **wrong**

The Ombudsman will also consider whether the process used by government was fair.

These are the criteria that guide the Ombudsman when considering government actions and decisions. In the following pages, we will discuss each and provide examples of their application in cases the Ombudsman has considered.

Unreasonable

When the Ombudsman finds that government acted unfairly, it is most often because an action or decision is found to be unreasonable. This is because "unreasonable" is a very broad term that can be applied in a number of ways. We will examine some of the most common.

Inconsistent with Other Decisions Made In Similar Circumstances

Common sense suggests that people in similar situations should be treated similarly. However, government often treats similarly situated people differently and the Ombudsman does not always consider this unfair.

For example, no one expects that every person who purchases vehicle insurance from SGI will pay the same premium. That cost would depend on the year, make and model of the vehicle insured, as well as the owner's driving record. But one would expect that two people with the same driving record who purchase insurance for identical vehicles will pay the same premium.

Government decisions are not always this simple or straightforward. Programs are offered to people in a variety of different circumstances. Consider social assistance and workers' compensation, for example. No one expects that all participants will be treated the same and receive identical decisions.

Neither does the Ombudsman. The Ombudsman ensures, instead, that practices and policies are consistent and applied consistently. If the Ombudsman finds that government's decision in one case is different than in another similar case and if that difference cannot be explained, the Ombudsman will find that government acted unreasonably and, therefore, unfairly.

Unreasonable

EXAMPLE

Alice was a part-time employee at a government agency. During her time there, her employer thought that part-time employees were not eligible to participate in the pension plan. For this reason, Alice did not contribute. Years later, it was learned that this was incorrect and that part-time employees had been eligible the entire time.

Alice and three other employees at the agency had been affected by the error. The other three, who were still working there, were given the option to purchase the pensionable time they had lost as a result of the error.

By the time the error came to light, Alice was no longer working at the agency. The agency viewed this as a significant difference because it could not offer Alice the resolution it had offered the other three. As a result, the agency offered Alice no resolution at all.

The Ombudsman concluded that this was unreasonable. All four employees' circumstances were the same and all suffered the same loss. The manner of calculating that loss was the same. The fact that Alice was no longer an employee did not mean that some resolution could not be offered to her; it only meant that the same resolution had to be achieved differently.

The Ombudsman observed that the agency could pay Alice directly its share of the pension credits that, had she contributed, would have accrued. Alice could match and invest these as she saw fit. This would put Alice in the same position as the other three employees. The difference in the manner of payment could not justify differential treatment among the affected employees. On the Ombudsman's recommendation, the agency agreed.

Unreasonable

EXAMPLE

Unreasonable

Inconsistent with the Weight of the Evidence

Some people would call this logic or just good common sense.

Basically, an action or decision will be unreasonable if the available evidence does not support it. This is, of course, easy to judge when the facts are straightforward but is much more difficult when the evidence does not strongly support any position or is contradictory.

When the Ombudsman finds that a decision is inconsistent with the weight of the evidence, it is often because communication has been imperfect and the decision-maker was given incomplete or erroneous information. In some cases, though, speculative information has been considered.

EXAMPLE

Shelley was receiving benefits from the Workers' Compensation Board and was awaiting surgery. As a mother of three young children who lived in a rural area, she asked that she not be scheduled to be in hospital over the Christmas break. Sure enough, an opening became available on December 18 and it was offered to Shelley. She declined that opportunity and had the surgery in the spring. After the surgery, she was able to return to work.

Unreasonable

The Workers' Compensation Board took the view that by declining the December date, Shelley had delayed her recovery. That is, if she had undergone the surgery in December, she would have recovered and been able to work four months sooner.

The Board believed that Shelley could have found child care even in December and so concluded that her decision to decline the December surgery was unreasonable. Consequently, the Board refused benefits for the four months of delay.

The Ombudsman agreed that if Shelley's refusal of the December date was unreasonable, her recovery was delayed and she would not be entitled to benefits during the period of delay. However, the Ombudsman was not convinced that Shelley's refusal was unreasonable.

Shelley advised that she and her husband farmed in a rural area. Her husband also had off-farm employment that sometimes placed him on 24-hour call; it happened that he was on call during the Christmas break. The couple did not have family members who could assist by coming in to care for the children, nor, despite inquiries, could they find anyone in the community to do this during the Christmas season.

The Ombudsman did not find any information suggesting that Shelley was exaggerating her circumtances, nor was there evidence supporting the Board's position. It appeared that the Board simply assumed or speculated that child care must be available somehow.

The Board's decision was based on speculation and was inconsistent with the facts and the evidence. It was therefore unreasonable. On the Ombudsman's recommendation, Shelley received the disputed benefits.

Unreasonable

Cannot be Rationally Explained

If a decision or action, when challenged, cannot be rationally explained, it must be unreasonable. We can have intelligent discussions about whether reasons are sound or even whether another person would have come to the same decision. But if it simply does not make sense, there's no discussion necessary: the decision is unreasonable.

EXAMPLE

Dawn was a social assistance recipient who had recently earned a Bachelor of Social Work degree. Dawn applied for positions in several locations and was thrilled when she was called for a number of interviews. Unfortunately, the Department of Community Resources and Employment advised her that social assistance could not provide funds to cover her expenses for travelling 350 kilometres to one of the interviews.

Social assistance rules state that expenses for travel to job interviews can only be funded if there are no similar opportunities available in one's current location. While this rule would make sense if Dawn was looking for a minimum-wage job in a fast-food restaurant, social work positions are not common and the competition for them is fierce. Even though there was a job advertised in Dawn's community (for which she had applied), it was unlikely that she would be the successful candidate. The Ombudsman thought it didn't make sense to apply the rule so narrowly that relevant circumstances were not taken into account. The decision, based on that narrow interpretation, was unreasonable. The Ombudsman recommended a broader perspective and the department agreed. Dawn's expenses were reimbursed.

Unreasonable

Effect Contrary to What Was Intended

Governments make rules and create programs to achieve certain results. Usually they succeed, but occasionally rules or programs have unintended impact. Should this occur, the Ombudsman will find that the rule or program is unreasonable.

EXAMPLE

Lenora, a senior citizen, owned and resided in her own home. She applied to participate in a federal/provincial program that offered grants and low-interest loans for home improvements to low-income people. Lenora was stunned when she was advised that she didn't qualify, given that her income was very minimal.

Lenora's health was somewhat challenged and she required the assistance of a live-in caregiver. Therein lay the problem. As live-in help, the caregiver was also a resident in Lenora's unit and the rules of the program required that the income of all residents be included when determining eligibility. The Ombudsman concluded that the rule was intended to apply to those who resided in the house as their home, and not to people who assisted in their care. Certainly, the caregiver's income was not available for the operation and maintenance of the house. It was also the case that this rule would render ineligible many of the very people who are most in need of the kind of help the program offers - seniors and people with significant disabilities. This was an unintended effect of an otherwise well-intentioned program. The inclusion of the care-giver's income was unreasonable.

Contrary to Law

While the ultimate power to interpret and apply laws lies with the courts, the Ombudsman is legally authorized and required to consider whether or not an action or decision of government is contrary to law. This is one of the most complicated of our considerations.

The most obvious manner of acting contrary to law is to contravene legislation or the common law. It is also, in our experience, the least common error.

One can act contrary to law, however, without directly contravening legislation. For example, a government agency may do something that is not legislatively authorized. Or, an agency may use its lawful powers in a manner that the legislation granting those powers did not intend. In the former case, government acts without authority. In the latter, it has exceeded its authority. In either case, its actions would be contrary to law.

Contrary to Law

EXAMPLE

Rural municipalities in Saskatchewan levy property taxes on land in their municipalities. If land owners don't pay, the municipalities expend a lot of time and effort trying to collect.

Saskatchewan Environment and Resource Management (SERM) grants annual permits that allow ranchers to graze cattle on crown lands. Most of the people it gives permits to are land owners. Some of them, it seems, don't pay their municipal taxes.

SERM agreed to help. The legislation under which SERM grants grazing permits authorizes the department to set conditions for permits that it thinks are appropriate. Using this power, SERM made the payment of municipal taxes a condition for the renewal of grazing permits.

The Ombudsman concluded that this condition, while well-intentioned, was contrary to law. The law requires that even when legislation appears to allow broad discretion for setting conditions, those conditions must nonetheless be related to the permitted activity. In this case, therefore, the conditions must relate to the land and its use. It would be acceptable, for example, to impose conditions respecting the payment of an annual fee or limiting the number of animals allowed to graze.

In this case, the municipal taxes and their payment were entirely unrelated to the grazing lands. In law, SERM could not use its powers to assist the municipalities in collecting those taxes. On the Ombudsman's recommendation, the condition was removed from the grazing permits.

Unjust

A decision or action of government will be unjust if it is inappropriately punitive or has consequences beyond what is appropriate to the circumstances.

If government was to act arbitrarily, that would also be unjust.

A decision or action of government would also be considered unjust if its effect was to impose inordinate and unnecessary obligations.

EXAMPLE

June was looking for a place to stay and moved in with her sister Mary temporarily while looking for an apartment of her own. The following month, Mary was stunned to find that an additional amount had been added to her SaskEnergy bill with a statement that if it wasn't paid, her service would be disconnected.

Mary didn't understand this because she had been a customer in good standing and had no accrued arrears. What Mary didn't know was that June hadn't been as responsible and had an outstanding debt to SaskEnergy. SaskEnergy took the view that since June was benefiting from the service at Mary's residence, that residence's account ought to take on the arrears. In the end, Mary had been made responsible for June's arrears and would remain so even if June left her residence.

SaskEnergy is frequently compromised by people who can't or won't pay their accounts, and has developed a number of methods for collecting the funds owed to it. Indeed, the Ombudsman has generally found these strategies to be fair. But this one was not.

Unjust

SaskEnergy had for a long time taken the view that all people who benefit from service are responsible for the account, irrespective of who is named on the bill. The Ombudsman agreed that this was generally reasonable, especially since it was based on a provision in the legislation governing the corporation.

However, SaskEnergy applied this to cases when a debtor subsequently enjoyed service elsewhere - as June did at Mary's house. The Ombudsman thought that this was an unreasonable interpretation. Mary had nothing to do with the outstanding account and had derived no benefit from the unpaid service. It was unjust to saddle her with June's debt. On the Ombudsman's recommendation, the debt was removed and Mary's good standing was restored.

Oppressive

Government acts oppressively when its actions or expectations overburden a person participating in a government program. For example, it might impose requirements that are out of proportion to the decision or circumstances.

EXAMPLE

Tom owed SaskPower a rather large sum of money, but when he applied for new service, SaskPower agreed to temporarily defer collecting it. Tom received service and paid his bills as they were rendered. Eventually, the circumstances that led to the deferral ceased and the deferred amount was added to Tom's current billings.

Tom met with SaskPower staff and they agreed to an arrangement whereby Tom would pay off the deferred amount in monthly installments. At the end of the conversation, Tom commented that his wife had a different surname and that if they had put the application for service in her name, SaskPower might not have noticed the deferred amount and made him pay it.

The next day, as is routine and reasonable practice, SaskPower checked and found that Tom's wife had an account from a few years earlier that she hadn't paid. That same day, SaskPower transferred the outstanding amount to Tom's new account and delivered written notice that the power would be disconnected unless the amount of his wife's debt was paid within four days. Unfortunately, Tom and his wife did not receive the notice and woke on the fourth day to find themselves without power.

Oppressive

Tom immediately went to the SaskPower office. He was told that power would not be restored until he paid all of the outstanding amounts - the current billing, the previously deferred amount and his wife's old account - plus a reconnection fee and security deposit.

The Ombudsman was of the view that Tom had acted in good faith when he attended the office to negotiate the payment arrangement. At that time, the corporation was not aware of Tom's wife's outstanding account and there was no indication that Tom was either. His circumstances were such that SaskPower was prepared to allow him to pay off a rather large amount in several installments.

The Ombudsman concluded that SaskPower's actions were oppressive in the sense that they were disproportionate to the circumstances. On discovering Tom's wife's debt, SaskPower frankly overreacted. Instead of giving Tom notice of her debt and even one billing cycle to pay it, SaskPower served notice and terminated Tom's service. On the Ombudsman's recommendation, Tom's power was restored and a reasonable payment arrangement was negotiated.

Improperly Discriminatory

Many government policies benefit a particular group of individuals and are intended to do so. Consider, for example, student loans. Interest-free loans granted with no need for collateral to a select group of people (students) is clearly discriminatory to those who are not students.

However, government sees a benefit in assisting students to complete post-secondary education and knows that many cannot secure conventional loans. Clearly, this discrimination is not improper or offensive.

Discrimination is improper if government applies discriminatory criteria that are not necessary to meet the objectives of the program. Conversely, discrimination is improper if government fails to treat similarly-situated people equally when there is no justification for differentiating.

EXAMPLE

Dan was a farmer who received social assistance benefits to top-up his income. His children, like many farm children, raised calves. When they sold them in the fall, the income was included when the Department of Community Resources and Employment calculated the family income. This, of course, reduced the family's social assistance benefits.

While the department calculates family income for all social assistance recipients, the Ombudsman noted that the income for "city kids" who have paper routes or Saturday jobs was not included in family income. The department's practice differentiated between types of children's income without justification and, in effect, discriminated against farm families. It was improperly discriminatory. On the Ombudsman's recommendation, the policy was changed.

Mistake of Law or Fact

In general, if a person does something because they think, in error, the law either permits or requires it, that person has made a mistake of law. On the other hand, if a person does something because the laws permits or requires it in certain circumstances and the person believes, in error, that those circumstances exist, the person has made a mistake of fact. In both cases, the person has acted unlawfully, and was not aware of it.

While admittedly confusing, the distinction between mistakes of fact and law can be very important in a purely legal consideration of the case. However, the distinction has little impact on an Ombudsman's review. This is because any consideration of the impact of mistake of law or fact will be offset by considerations of fairness. As such, the Ombudsman has had few cases where the conclusion was based soley on mistake of law or fact. That being the case, consider the following hypothetical examples.

EXAMPLE

David purchased a sport fishing licence that allowed him to catch six jackfish per day and to possess six jackfish. David had a few good days on the lake but never took more than six jackfish per day. He ended up with twelve in his freezer, and was surprised when the conservation officer told him that he was over the limit. He thought the licence allowed him to possess six jackfish per day, not six in total. David made a mistake of law.

Let's say, on the other hand, David had six fish in his freezer that he thought were jackfish but which were in fact pickerel. He would also be surprised to learn that he was not in compliance with the conditions of his licence. He knew the licence allowed him six jackfish and thought that's what he had. But he was wrong and had made a mistake of fact.

Wrong

This is possibly the easiest of the criteria to understand and apply because it means just what it says: the decision or action or its effect is simply wrong. The decision or action may also offend one or all of the other criteria or it may not offend any. But nonetheless, it is wrong.

EXAMPLE

Correctional centres are anxious to eliminate contraband (for example, drugs) and they know that visitors sometimes bring contraband into the centres. Therefore, a number of policies are directed at preventing visitors from bringing contraband into correctional facilities.

One policy allows centre staff, when they have information that leads them to believe that a visitor might be bringing contraband, to require that the visitor submit to a strip-search or be denied access to the centre. This policy is generally reasonable in a correctional setting.

However, if an adult visitor brought children for the visit, the children were subject to the same policy. Even recognizing that some visitors will conceal contraband on children, the Ombudsman concluded that it is morally wrong to require children to submit to the invasive and disturbing process of a strip-search. On the Ombudsman's recommendation, the practice of strip-searching children was discontinued.

Fair Process

In deciding whether or not a decision is fair, the Ombudsman places considerable emphasis on the process through which the decision was reached. No matter what the merits of a particular action or decision are, if the process followed is improper, government has acted unfairly. A fair process increases the likelihood of sound and supportable decisions and will also help to secure confidence in and acceptance of decisions. These are important to both government and the people it serves.

A fair process is one that assures, to use a common expression, a level playing field. On that field, the rules are fair, all participants know the rules, all parties play by the rules and the rules are applied equally in every game and on every play. In law, that level playing field is assured through the application of the rules of natural justice and these are the Ombudsman's reference when deciding if a process is fair.

Fair process requires that:

- **The person affected is aware that a decision will be made;**
- **The person affected is aware of the information that will be considered when the decision is made;**
- **The person affected is given an opportunity to provide his or her own information and to challenge the information in the decision-maker's hands;**
- **The decision-maker considers all relevant information and nothing irrelevant when making the decision;**
- **The decision-maker is unbiased; and**
- **The person affected is notified and provided reasons for the decision.**

Fair Process

This does not mean, of course, that every person will be entitled to a formal hearing with a right to counsel and cross-examination in every instance. Instead, the requirements of fair process are fluid and the Ombudsman's expectations will depend on the nature, impact and complexity of the decision. That is, a person who applies to renew his driver's licence can expect the requirements of fair process will be met but should not expect a process as complicated as would be afforded to a person whose driver's licence is being considered for suspension. And that person would not expect a process as complicated as would be given in a case where a person faces imprisonment for driving while suspended.

LE

While correctional facilities are primarily charged to work toward the rehabilitation of inmates in a living environment as normal as possible, they are also required to ensure the good order of the institutions and the safety of inmates and staff. Sometimes, inmate behavior threatens good order and it becomes necessary to segregate an inmate from the general population of the institution. This is an extraordinary measure because it restricts an inmate's liberty beyond what is normal for an incarcerated person. Fair process is, therefore, especially important to minimize the chance of error.

Fair Process

If, for example, an inmate threatens or assaults another inmate, the aggressor may be placed in segregation. Following placement there, a panel of corrections staff will review the placement at regular intervals to determine whether the inmate's conduct justifies continued segregation.

Fair process requires that the inmate knows when the panel will review his case, what information will be considered and what is necessary to obtain a placement back into the general population. Then, the inmate must be given an opportunity to provide his information to the panel and to argue against information that the panel has received from other sources. Finally, the inmate must be notified of the panel's decision and its reasons.

In a public report on conditions of custody in Saskatchewan's adult correctional facilities, the Ombudsman concluded that the correctional centres do not always meet these requirements. Segregated inmates are often not aware of all of the information before the panel and there is no clear process to provide the inmate's perspective to the panel. The decision is provided but reasons are not always thorough or complete. In addition, the Ombudsman questioned whether the panel ought to include independent members who are not part of the corrections department's staff.

The Ombudsman concluded that the process, while often leading to decisions that were appropriate and fair on their merits, is nonetheless unfair. It does not meet the standards required for a decision affecting an individual's liberty.

Conclusion

It is evident that the criteria the Ombudsman uses in assessing the fairness of government decisions and actions are more complicated than the ordinary use of the word "fairness" might indicate. Even with 30 years of experience and consequent expertise, the Ombudsman's office does not always or even often find the application of the criteria to be straightforward. We hope that the information in this booklet helps the reader to better understand both the criteria and the Ombudsman's work.